

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

REC'D TN
REGULATORY AUTH.

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OFFICE OF THE
EXECUTIVE SECRETARY

**IN RE: PROCEEDING FOR THE PURPOSE OF ADDRESSING
COMPETITIVE EFFECTS OF CONTRACT SERVICE
ARRANGEMENTS FILED BY BELL SOUTH
TELECOMMUNICATIONS, INC. IN TENNESSEE**

Docket No. 98-00559

**MEMORANDUM BRIEF OF AT&T COMMUNICATIONS OF THE SOUTH
CENTRAL STATES, INC. IN SUPPORT OF MOTION TO REMOVE CERTAIN
DOCUMENTS FROM THE STATUS OF "CONFIDENTIAL" UNDER THE
PROTECTIVE ORDER**

THE FACTS

On September 16, 1998, a blanket Protective Order was entered in this matter, approved by all counsel of record, that is generally consistent with other such orders entered by the Tennessee Regulatory Authority ("TRA") in matters of this general nature.

The basis for the entry of this Protective Order is stated in its recital:

To expedite the flow of filings, exhibits and other materials, and to facilitate the prompt resolution of disputes as to the confidentiality of the material, adequately protect material entitled to be kept confidential and to ensure that protection is afforded only to material so entitled, the Tennessee Regulatory Authority ("TRA") hereby orders that:

Pursuant to Paragraph 4 of that Protective Order, BST's two CSAs which are now the focus of this proceeding are designated as "Confidential." However, in producing to AT&T copies of the two CSAs that are the subject of this proceeding, BST redacted the names of the two customers.

In addition, BST has produced a number of documents in response to discovery requests, some of which documents have been stamped by BST as "Confidential"; some of which BST has stated in correspondence, or otherwise that BST considers them to be "Confidential"; and others as to which it is not clear whether BST considers them "Confidential."¹ However, BST has not complied with the requirements of the Protective Order in designating documents as "Confidential." Paragraph 1 of the Protective Order provides in pertinent part:

Each document containing CONFIDENTIAL INFORMATION must be highlighted under or through the passages of information to clearly identify the CONFIDENTIAL INFORMATION without defacing the information or rendering it undecipherable. The document must be accompanied by proof of confidentiality, that is, an affidavit showing the cause of protection under this Order.

BST neither "highlighted" passages of information nor served an "affidavit showing the cause of protection under this Order." In none of the BST documents received by counsel for AT&T did BST comply with the requirements of Paragraph 1 of the Protective Order.

This matter is now set for hearing on August 17 and 18, 1999.

AT&T's motion is filed pursuant to Paragraph 12 of the Protective Order, which provides:

¹ Paragraph 7 of the Protective Order provides a procedure when a party has inadvertently failed to designate documents as confidential. Even if that procedure were to be followed, the basis of this Motion would still stand.

Any party may contest the designation of any document or information as CONFIDENTIAL by filing a motion with the TRA, Pre-Hearing Officer, Administrative Law Judge or the courts, as appropriate, for a ruling that the documents information, or testimony should not be so treated. All documents, information and testimony designated as CONFIDENTIAL, however, shall be maintained as such until the TRA, the Pre-Hearing Officer, the Administrative Law Judge, or a court orders otherwise. A Motion to contest must be filed not later than fifteen (15) days prior to the Hearing on the Merits. Any Reply from the Company seeking to protect the status of their CONFIDENTIAL INFORMATION must be received not later than ten (10) days prior to the Hearing on the Merits. Motions made and subsequent replies received with the ten (10) days prior to the hearing on the Merits shall be presented to the Authority at the Hearing on the merits for a ruling.

The use of "Confidential" documents or information at any hearing is governed by Paragraph 9 of the Protective Order, which provides:

Documents, information and testimony designated as CONFIDENTIAL, in accordance with this Order, may be disclosed in testimony at the hearing of this proceeding and offered into evidence used in any hearing related to this action, subject to the Tennessee Rules of Evidence and to such future orders as the TRA, the Pre-Hearing Officer, or the Administrative Law Judge may enter. Any party intending to use documents, information, or testimony designated CONFIDENTIAL shall inform the producing party and the TRA, the Pre-hearing Officer, or the Administrative Law Judge, prior to the hearing on the merits of the case in the manner designated previously in this Order, of the proposed use; and shall advise the TRA, the Pre-Hearing Officer, or the Administrative Law Judge, and the producing party before use of such information during witness examinations so that appropriate measures can be taken by the TRA, the Pre-hearing Officer, or the Administrative Law Judge to protect the confidential nature of the information.

Simultaneously with the filing of AT&T's motion herein, AT&T is filing and serving a designation to use the subject documents at the hearing.

THE CONTROLLING LAW

1. Protective Orders in Contested Cases – the Standards under the Tennessee Rules of Civil Procedure.

The powers of the TRA are statutory. No statute expressly gives the TRA the general power to enter protective orders. In contested case proceedings, T.C.A. §4-5-311 does give the TRA, and other administrative agencies, the power to enter protective orders in accordance with the Tennessee Rules of Civil Procedure. Therefore, the provisions of Rule 26.03, Tennessee Rules of Civil Procedure, govern protective orders entered by the TRA in contested cases; and decisions by the Tennessee Appellate Courts construing that rule control its interpretation and application.

The Tennessee Supreme Court in Ballard v. Herzke, 924 S.W.2d 652 (Tenn. 1996) set forth definitive rules governing protective orders under the Tennessee Rules of Civil Procedure.

First, under the Rule, protective orders are to be entered for “good cause shown.” As the Court stated, at page 658:

To establish “good cause” under Rule 26(c), the moving party must show that disclosure will result in a clearly defined injury to the party seeking closure. “Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning,” do not amount to a showing of good cause. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir.1986). Mere conclusory allegations are insufficient. The burden of justifying the confidentiality of each and every document sought to be covered by a protective order is on the party seeking the order. *Id.*; see also *Loveall v. American Honda Motor Co.*, 694 S.W.2d 937, 939 (Tenn. 1985).

Second, in the context of private litigation in courts, the Court stated the factors to be considered by trial courts, at pages 658-659:

In determining whether good cause has been established for a protective order, it is important that trial courts balance one party's need for information against the injury that would allegedly result if disclosure is compelled. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv.L.Rev. 427, 433-35 (1991). Factors in the balance weighing against a finding of good cause include: (1) the party benefitting from the protective order is a public entity or official; (2) the information sought to be sealed relates to a matter of public concern; and (3) the information sought to be sealed is relevant to other litigation and sharing it would promote fairness and efficiency. *Pansy*, 23 F.3d at 787.

On the other hand, factors in the balance weighing in favor of a finding of good cause include: (1) the litigation involves private litigants; (2) the litigation concerns matters of private concern or of little legitimate public interest; and (3) disclosure would result in serious embarrassment or other specific harm. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-36, 104 S.Ct. 2199, 2208-09, 81 L.Ed.2d 17 (1984); *Cipollone*, 785 F.2d at 1121. No particular weight is assigned to any factor, and the balancing test allows trial courts to evaluate the competing considerations in light of the facts of each individual case.

Third, once entered, protective orders may be modified. The Tennessee Supreme Court, at page 659, adopted the standard for modification based on the same balancing test used to decide whether to enter such an order, plus the added factor of reliance of the parties on the protective order. The Court noted, in fn.4, that the reliance factor illustrates the importance of a proper balancing analysis to determine whether a protective order should be entered in the first place. Where there has been no balancing analysis, modification is proper.

Fourth, blanket protective orders, such as the one entered in this matter, may be entered; but such orders are "peculiarly subject to later modification," at page 660.

Fifth, with respect to blanket protective orders, the Court stated at page 660:

When modification of a blanket protective order is sought, the party seeking to maintain confidentiality must designate the documents alleged to be confidential and then establish that good cause exists with respect to those documents.

Thus, in this matter, the burden was, and is, on BST to designate the documents alleged to be confidential and to establish that good cause exists for the confidentiality of each document so designated.

2. The Public Interest in Access to Proceedings Before the TRA – the Requirement of Open Meetings.

The standards and factors to be considered for protective orders under the Tennessee Rules of Civil Procedure provide the basis for consideration of protective orders by the TRA in contested cases. However, proceedings such as this involving public issues as to anticompetitive and unduly discriminatory or preferential practices, require an emphasis on the public interest. This proceeding is not mere private litigation; rather, it is, by virtue of its basic nature, a matter of public concern and interest.

Article I, Section 19 of the Tennessee Constitution makes clear that in this state, “[T]he printing presses shall be free to every person to examine the proceedings of the Legislature; or any other branch or officer of the government, and no law shall ever be made to restrain the right thereof” (Emphasis added). A cardinal principle of government in this state is openness. Thus, in balancing rights of privacy and of openness, the fact that governmental proceedings and matters of public interest and concern are involved must be given great weight.

Keeping some aspect of TRA proceedings secret, or closing proceedings to the public, should be done, if at all, only on the gravest occasions of extreme necessity. Indeed, the General Assembly has declared it to be the policy of this State, “that the formation of public policy and decisions is public business and shall not be conducted in secret,” T.C.A. §8-44-101(a). T.C.A. §8-44-102(a) provides that all meetings of any governing body, which includes the TRA, are declared to be open to the public at all times, except as provided by the Constitution of Tennessee. Any order entered embodying a decision made in violation of the Open Meetings Law probably would be held invalid; T.C.A. §8-44-105.

3. The Public Interest in Tariffs and the Rates and Practices of Public Utilities

In the provision of local exchange telephone service, BST functions as both a public utility and a common carrier, providing essential public services. As such a public utility and common carrier, BST has statutory duties owed to the public. A core duty is not to engage in unduly discriminatory or preferential rates or practices. In imposing that duty, the Tennessee statutes, like the Federal Communications Act, are modeled after the Interstate Commerce Act. The filing, and thereby the publishing to the public, of schedules or tariffs setting forth the rates, practices and terms and conditions of the service offered was and is, central to the regulatory system governing BST for the prevention of undue discrimination or preference: See, e.g., MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 230, 114 S.Ct. 2223, 2236, 129 L.Ed.2d 182 (1994).

BST’s numerous CSAs, including the two subject CSAs, represent a substantial departure from BST’s tariffs and from the basic intent of the tariff process. Whether, and

the extent to which, such a departure is consistent with sound regulatory policy is an issue of significant public interest and concern.

In 1995, the Tennessee General Assembly added the provisions of T.C.A. §65-5-208(c) empowering the TRA to issue orders to prohibit anticompetitive practices. If competition is to develop in this State, in keeping with the declared legislative policy, programs and policies of incumbent local exchange telephone companies which may have an anticompetitive effect also raise issues of significant public interest and concern.

4. The Provisions of T.C.A. §65-3-109

T.C.A. §65-3-109, originally adopted in 1897 for railroad regulation, which is incorporated by reference and made applicable to the TRA's regulation of public utilities by T.C.A. §65-4-105(a), provides:

The department shall not give publicity to any contracts, leases, or engagements obtained by it in its official capacity, if the interests of any company would thereby be injuriously affected, unless, in the judgment of the department, the public interest requires it.

It is doubtful that CSAs come within the intent of this statute. A statute should be construed in keeping with the context of its adoption, MCI v. American Tel. & Tel. Co. supra, 114 S.Ct. at 2230. Railroads did not enter into anything like CSAs when this statute was adopted. Nevertheless, the public interest, as discussed above, provides the basis for making the content of such CSAs open to the public for the purposes of this proceeding.

APPLICATION OF THE CONTROLLING LAW TO THE ISSUES RAISED BY AT&T'S MOTION

1. The Status of the CSAs.

After redacting the names of the respective customers, CSA KY98-4958-00 and CSA TN98-2766-00 should be removed from the status of "Confidential." Consideration of the particular terms and conditions of the subject CSAs is an essential aspect of this case. The public interest in enforcing the statutes prohibiting undue discrimination or preference and anticompetitive practices is a paramount consideration. It is neither feasible nor practical to attempt to conduct the hearing of this matter without detailed consideration of the specific terms and conditions of the two CSAs which are to be ruled upon. No feasible or practical procedure exists whereby open consideration of these terms and conditions can be avoided.

Under the general policies of this state concerning proceedings by governmental agencies, including the Open Meetings Law, the TRA has no power to close the hearing of this matter to the public.

Applying the factors listed in Ballard, supra:

The factors against a finding of good cause are applicable:

- (1) BST, the party claiming the benefit of the protective order, while not a public entity or official is a regulated public utility, having statutory duties owed to the public, the performance of which duties are reflected in the subject CSAs.
- (2) The information sought, i.e., the open discussion of the terms and conditions of the two CSAs, relate to a matter of public concern.

- (3) The information sought is relevant to other proceedings before the TRA and sharing it publicly would promote fairness and efficiency.

The factors favoring a finding of good cause are not applicable:

- (1) This proceeding does not merely involve private litigants;
- (2) This proceeding does not concern matters of private concern of little legitimate public interest;
- (3) Disclosure of the specific terms and conditions of the CSAs would not result in serious embarrassment or other specific harm.

Moreover, since the inclusion of the two CSAs within the Protective Order was not based on a balancing analysis, BST is not justified in claiming reliance on the Protective Order; rather, the Protective Order itself provides for contesting, and thereby modifying, its application to any document.

The privacy interests of BST's customers can be adequately protected by redacting their names from any copies introduced into evidence and by avoiding any mention of the identity of such customers.

In summary, there is no good cause for maintaining the confidentiality of the specific terms and conditions of the two CSAs. On the contrary, the public interest requires the full disclosure of each specific term and condition at the hearing, in any briefs filed by the parties and in any orders issued by the TRA.²

² In its orders of proving or denying CSA tariff filings, the TRA has necessarily discussed the particular terms and conditions of CSAs without identifying the names of the customers.

2. The Documents listed in AT&T's Motion Should Be Removed from the Status of "Confidential."

First, BST has not followed the procedure specified in the Protective Order for the proper designation of documents as "Confidential." The Protective Order provides that, "The document must be accompanied by proof of confidentiality, that is, an affidavit showing general cause of protection under this Order." No such affidavits were filed with respect to the subject documents.³ The failure to file such affidavits cannot be cured by the procedures specified in Paragraph 7 of the Protective Order – at least without a clear showing by BellSouth of good cause in accordance with the factors set forth in Ballard. Therefore, the subject documents do not come within the scope of "Confidential" as provided in the Protective Order.

Second, the factor analysis required in Ballard, supra, demonstrates that the subject documents are not entitled to treatment as "Confidential."

The factors against a finding of good cause are applicable:

- (1) BST, the party claiming the benefit of the Protective Order, while not a public entity or official, is a regulated public utility, having statutory duties owed to the public, the performance or nonperformance of which duties are reflected in the subject documents.
- (2) The information sought, i.e., the specific programs and policies adopted and implemented by BST with respect to CSAs, including the subject CSAs, relates to a matter of public concern; and

³ BST also did not even stamp all documents as "Confidential" which it intended to be "Confidential" and did not highlight or otherwise indicate the specific parts of documents it considered to be "Confidential."

- (3) The information sought is relevant to other proceedings before the TRA and sharing it publicly will promote fairness and efficiency.


The factors favoring a finding of good cause are not applicable:

- (1) This proceeding does not involve merely private litigants;
- (2) This proceeding does not concern matters of private concern of little legitimate public interest – to the contrary, this proceeding concerns two of the most basic aspects of public utility regulation, i.e., the prohibition of unduly discriminatory or preferential practices and the prohibition of anticompetitive practices; and
- (3) Disclosure of the subject documents will not result in serious embarrassment or other specific harm.

Moreover, since BST did not follow the requirements of the Protective Order to show good cause, and no balancing analysis has occurred, BST is not justified in claiming reliance on the Protective Order. The Protective Order itself provides for contesting, and thereby modifying, its application to any document.

Third, the public interest in open meetings, and in the prompt, speedy and inexpensive conduct of proceedings in a fair and efficient manner requires that the subject documents be fully disclosed.

In summary, there is no good cause for maintaining the confidentiality of the subject documents. On the contrary, the public interest requires the full disclosure of each such document to be used in the making of the decision in this case, at the hearing, in any briefs filed by the parties and in any order issued by the TRA. However, names of customers appearing in any such documents should be redacted from any copies introduced at the hearing, or otherwise made public, and should be kept confidential.



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